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Re: Freedom of Information Act Request
Request No. EPA-R10-2016-004821
Portland Harbor Superfund Site

Dear Ms. Fleming and Ms. Cora:

On behalf of the Portland Harbor PCI Group, I write in reply to Ms. Fleming's April 1st, 2016 letter regarding a Freedom of Information Act ("FOIA") request submitted by the PCI Group to the Environmental Protection Agency ("EPA") on March 16th.¹ The March 16th FOIA request seeks EPA records related to the Portland Harbor Superfund Site ("Site") in Oregon.

¹ The Portland Harbor PCI Group is carrying out the Portland Harbor Superfund Site Allocation Process. This letter, like the original March 16 FOIA request, is submitted on behalf of each individual Portland Harbor PCI Group member except for the following parties, none of whom are participating in this FOIA request: City of Portland, Port of Portland, Oregon Department of State Lands, Oregon Department of Transportation, and all Federal PRPs, including the Bonneville Power Administration, Defense Plant Corporation, Reconstruction Finance Corporation, U.S. Army Corps of Engineers, U.S. Coast Guard, U.S. Department of the Navy, U.S. General Services Administration, and U.S. Maritime Administration.

General Issues

The PCI Group FOIA Request Reasonably Describes the Records Sought

Ms. Fleming's April 1st letter seems to ask for a wholesale revision of the PCI Group's March 16th FOIA request. EPA believes that the March 16th request, "at least in part, does not reasonably describe the records" being sought. The PCI Group is confident, however, that its request did "reasonably describe" the records sought, and that the request need not be overhauled or substantially pared down. Records are "reasonably described if a professional employee of the agency familiar with the subject matter can locate the records with a reasonable amount of effort." *Freedom Watch, Inc. v. Cent. Intelligence Agency*, 895 F. Supp. 2d 221, 228 (D.D.C. 2012) (internal quotation marks omitted). As Ms. Fleming's letter explains, EPA generally asks that FOIA requestors identify records using specific information such as dates, authors, recipients, and subject matter. 40 C.F.R. § 2.102(c). However, "a document need not be specified by name to be reasonably within the scope of a request." *Van Strum v. U.S. Envtl. Prot. Agency*, 680 F. Supp. 349, 352 (D. Or. 1987).

Consistent with EPA's FOIA regulations, the PCI Group's March 16th FOIA request describes the records sought by reference to particular authors, recipients, and subject matter. As a result, the request is not so broad that EPA cannot respond to it with a reasonable amount of effort. This is not a case like *Freedom Watch, Inc. v. Central Intelligence Agency*, 895 F. Supp. 2d 221, 228-29 (D. D.C. 2012), in which a "virtually incomprehensible" FOIA request contained forty-nine separate "similarly vague inquiries" encompassing, among other things, anything at all relating "in any way" to a large number of foreign nations.

The PCI Group's FOIA request pertains to a large and complex contaminated sediment site for which even a proposed remedy has been fifteen years in the making. That proposed remedy, which EPA will soon divulge to the public, is anticipated to cost billions of dollars and take many years to complete. The records sought by the PCI Group in its FOIA request involve the crucial factual and scientific underpinnings of a massive undertaking that PCI Group members will ultimately be required to finance and perform.

Given this context, the PCI Group firmly believes that it has "reasonably described" the records sought in its FOIA request. Nevertheless, the PCI Group has made a number of revisions and clarifications to its March 16th request in a good faith effort to adjust the scope of the request and assist EPA in identifying records. A revised FOIA request is attached to this letter, and specific clarifications are also provided below.

The PCI Group FOIA Request is "Proper"

Ms. Fleming's letter asserts that many of the individual queries in the PCI Group FOIA request are not "proper" FOIA requests. The PCI Group does not agree. Nowhere does the PCI Group's request ask EPA to do more than is required by the FOIA.

Only “[t]wo requirements must be met in order for a FOIA request to be proper: (1) the request must reasonably describe the records sought, and (2) it must be made in accordance with published rules stating the time, place, fees (if any), and procedures to be followed.” *Freedom Watch*, 895 F. Supp. 2d at 228 (internal quotation marks omitted). The March 16th FOIA request expressly, exclusively, and appropriately seeks agency records. EPA has not suggested that the PCI Group failed to follow the agency’s published rules and procedures for FOIA requests. And, as discussed above, the PCI Group’s FOIA request reasonably describes the records being sought. Nothing more is required under the FOIA. The PCI Group’s request is proper.

Definition of “Reflecting”

Ms. Fleming’s letter also repeatedly asks what the term “reflecting” means in the context of individual queries contained in the March 16th FOIA request. The PCI Group has revised its request and, in many instances, it has eliminated the word “reflecting” in order to reduce any confusion on EPA’s part. Still, for the sake of providing a thorough answer to Ms. Fleming’s letter, the PCI Group clarifies that, as used in its March 16th FOIA request and in the revised request enclosed with this letter, the word “reflecting” means showing, demonstrating, or discussing the existence, effect, purpose, origin, or character of the records described. Note that, regardless of the particular terms used in the PCI Group’s request, EPA “should err on the side of liberally construing what material falls within the scope of the request.” *Dunaway v. Webster*, 519 F. Supp. 1059, 1083-84 (N.D. Cal. 1981) (holding that agency improperly withheld material relevant to subject of FOIA request). When the subject of a request is identified, as here, EPA “is obliged to release any information, subject to the [statute’s] specified exemptions, which relates to the subject of the request or which in any sense sheds light on, amplifies, or enlarges upon that material which is found in the same documents.” *Id.* at 1083.

Specific Clarifications

Ms. Fleming’s letter includes a number of “directed questions” regarding the separate queries contained in the PCI Group’s March 16th FOIA request. Most of these individual requests for clarification overlap substantially, and at least two key issues raised repeatedly in those directed questions have been addressed earlier in this letter – namely, the definition of “reflecting” and the fact that each individual query is a “proper” FOIA request. In addition, the PCI Group has enclosed a revised FOIA request with this letter, and that revised request is intended in good faith to assist EPA in searching for and identifying the records sought. Nonetheless, the PCI Group provides the following responses to Ms. Fleming’s directed questions.

Request No. 1.

Request No. 1 seeks records related to a decision by EPA to assume control of the Site Feasibility Study (“FS”) from the Lower Willamette Group (“LWG”). EPA announced that decision in a January 4, 2016 letter to the LWG.

Contrary to Ms. Fleming's assertion, Request No. 1 does reasonably describe the records being sought. Request No. 1 narrowly seeks records "containing the facts, considerations, reasons, reasoning, and conclusions that were considered and / or that support" a particular and recent EPA decision. Further, it is irrelevant that the January 4th letter was subsequently "withdrawn" by EPA and replaced with another letter. Ms. Fleming's letter identifies no legal rationale under which EPA's subsequent "withdrawal" of the January 4th letter would preclude a FOIA request for records related to the original letter and the decision described in that letter.

Although Ms. Fleming's letter claims that Request No. 1 cannot be answered because the PCI Group created a "unique term" for purposes of the request, it must be noted that the referenced term was simply a good faith effort by the PCI Group to identify the records sought with particular specificity. In other words, the PCI Group's effort to define the "unique term" to which Ms. Fleming now objects was an effort to provide exactly the type of descriptive precision and limiting language that EPA now claims to be seeking. Ms. Fleming's letter reflects an unfair and unreasonable inconsistency: EPA will refuse to provide records where it claims that a FOIA request is insufficiently specific, and the agency will also refuse to provide records where it deems a request too specific due to the use of defined terms that and would purportedly require "speculation" by EPA. This position is especially unfair where a given term is expressly defined by reference to EPA's own language – here, the language of the January 4th letter itself.

EPA made a decision to assume control of the FS from the LWG, and to complete the FS without the LWG's continued assistance. EPA both defined and communicated this decision to the LWG in a letter dated January 4, 2016. The PCI Group now seeks specific EPA records related to that decision. Request No. 1 is a proper FOIA request.

Request No. 2.

Ms. Fleming's letter indicates that some of the records responsive to Request No. 2 can be found on EPA's website. The PCI Group appreciates this direction, and will review the referenced website. When providing the PCI Group with a formal response to its request, which should include those responsive records that cannot be found on EPA's website, please again identify the website and specify the responsive records that can be found there.

Ms. Fleming's letter also asks whether Request No. 2 seeks records provided by EPA to CSTAG and NRRB or whether it is limited only to records provided by CSTAG and NRRB to EPA. The PCI Group is seeking records in both categories, including, as stated in the original request, "correspondence within, to, or from EPA regarding" CSTAG and NRRB comments on the development of a Remedial Investigation ("RI"), FS, and Proposed Plan.

Request No. 3.

Ms. Fleming's letter claims that the phrase "All agency records reflecting or related to communications . . . regarding the site" is "broad and undefined and not a proper FOIA request." That is incorrect, because the PCI Group's FOIA request included specific definitions for the terms "agency records" and "communications." In addition, Ms. Fleming's letter omits key

limiting terms in the quoted phrase. Request No. 3 does not seek any and all communications regarding the site, but instead seeks communications between specified EPA offices, together with staff members, consultants, and other representatives of those specified offices.

The PCI Group has made a good faith effort to provide further clarification of Request No. 3 in the revised FOIA request that is enclosed with this letter.

Request No. 4.

Ms. Fleming's letter claims that the phrase "All agency records reflecting . . . consideration and review of the proposed cleanup action for the site, hereinafter referred to as the 'NRRB Review'" is "vague and undefined." That is again incorrect, because the March 16th FOIA request specifically defines the terms "agency records" and "NRRB Review." Ms. Fleming's letter also omits key terms when quoting Request No. 4. Request No. 4 seeks agency records reflecting or related to consideration and review by NRRB and CSTAG of the proposed cleanup action for the Site. The PCI Group disagrees that this request is vague and undefined.

The PCI Group appreciates EPA's direction regarding the availability of certain responsive records on the EPA website. The PCI Group will review the referenced website. When providing the PCI Group with a formal response to its request, which should include those responsive records that cannot be found on this website, please again identify the website and specify the responsive records that can be found there.

Request No. 5.

Ms. Fleming's letter claims that the phrase "All agency records reflecting or related to communications" is "broad and undefined and is not a proper FOIA request." Once again, that assertion fails to account for the specific definitions of "agency records" and "communications" that are included in the request. Also, Ms. Fleming's letter again omits key limiting terms when quoting the relevant phrase. Request No. 5 does not seek any and all communications of any sort, but instead seeks communications between specified agencies, and the staff, consultants, and other representatives of those specified agencies, regarding particular subject matter areas identified in the request.

The PCI Group disagrees that Request No. 5 is "undefined," and notes that a FOIA request is not inherently "improper" just because EPA believes it is "broad." With respect to Ms. Fleming's claim that the term "EPA FS Takeover Decision" is "undefined," please see the PCI Group's response to the directed question regarding Request No. 1.

The PCI Group has made a good faith effort to provide further clarification of Request No. 5 in the revised FOIA request that is enclosed with this letter.

Request Nos. 6 through 10.

Ms. Fleming's directed question" regarding Request Nos. 6 through 10 are essentially identical to the directed question regarding Request No. 5. As such, the PCI Group's response to Ms. Fleming's directed questions regarding Request No. 5 applies equally to the directed questions regarding Request Nos. 6 through 10.

The PCI Group has made a good faith effort to provide further clarification of Request Nos. 6 through 10 in the revised FOIA request that is enclosed with this letter.

Request No. 11.

Ms. Fleming's letter claims that the phrase "records reflecting or related to cost breakdowns" is "unclear and undefined." The PCI Group does not agree, but it also has already provided a more detailed definition for the word "reflecting," as used in its March 16th FOIA request.

The PCI Group has also made a good faith effort to provide further clarification of Request No. 11 in the revised FOIA request that is enclosed with this letter.

Payment and Timing

Ms. Fleming's letter seeks assurance from the PCI Group that it can and will pay an estimated \$10,000.00 in costs associated with EPA's response to the FOIA request. The PCI Group agrees to cover EPA's reasonable costs of responding to the FOIA request, up to \$10,000, as requested by Ms. Fleming.

Ms. Fleming's letter also indicates that it will take EPA two years to respond to the PCI Group's FOIA request rather than the normal statutory response time of twenty business days. This extended time horizon for a response is deeply troubling to the PCI Group. Whatever the burden on EPA in responding to the PCI Group's FOIA request, the purpose of that request is to gather sufficient information to enable substantive and meaningful comments on the agency's soon-to-be released FS, Proposed Plan, and Record of Decision ("ROD"). EPA is expected to choose a remedy for the Site costing in the billions of dollars. As parties who will perform and finance the work associated with EPA's proposed remedy, the individual PCI Group members submitting this request are deeply invested in ensuring that the Proposed Plan is reasonable, necessary, and supported by sound science. The PCI Group is also deeply invested in ensuring that the ROD is accurate and complete.

The PCI Group's lawful effort to use a FOIA request to obtain government records is not intended to burden EPA or stall the process of cleaning up Portland Harbor. As mentioned above, this is a process that has so far played out over more than fifteen years. EPA's desire to finalize its FS, Proposed Plan, and ROD within a short period of time is not necessarily unreasonable, standing alone, and that desire is shared by many members of the PCI Group. But the speed with which a remedy is chosen and implemented is no more important than making sure that a proper remedy is chosen, and any motivation for quickly finalizing the process must

be an appropriate one. Given the narrow time constraints within which the PCI Group and its members must evaluate EPA's FS, Proposed Plan, and ROD when they are issued, it is critical that EPA provide the complete factual and analytical basis for those documents as soon as possible.

Faced with a proper FOIA request for agency records, "[t]he agency response is to be made promptly." *Favish v. Office of Indep. Counsel*, 217 F.3d 1168, 1171 (9th Cir. 2000). This promptness requirement is "aimed at the sluggishness all too characteristic of bureaucracies." *Id.* The requirement of expediency serves the purpose of the FOIA, which "is to shed light 'on an agency's performance of its statutory duties.'" *Id.* (quoting *U.S. Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 772-73 (1989)). This statutory purpose is not served, and the statutory language is not satisfied, where an agency's response takes so much time that the agency cannot be held accountable to the public for decisions that have long since been made by the time records are disclosed. If it takes EPA two full years to provide the PCI Group with responsive records serving as the basis for a decision to be made in a matter of weeks or months, such delay will substantially prejudice the PCI Group and the public at large, and it will frustrate the policy goals that underpin the FOIA.

The PCI Group is not asking EPA to produce records that it has already made available to the public or to the PCI Group. Nor is the PCI Group asking EPA to provide more than agency records that are in its possession, consistent with the FOIA and also with various directives of the President and Attorney General's office. The PCI Group is happy to provide the clarifications discussed in this letter and reflected on the revised FOIA request enclosed here. In addition, I and other representatives of the PCI Group would be willing to meet and confer with EPA in good faith regarding potential ways to adjust the time and cost required to respond to this FOIA request.

On behalf of the PCI Group members responsible for this FOIA request, I thank you for your continued efforts to provide a complete and timely response to this request.

Sincerely,



Bruce White
Allocation Team Coordinating Counsel

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